

³ The Board notes that following the September 17, 2019 OWCP decision, appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant met her burden of proof to establish total disability for the period May 31 through June 22, 2016 causally related to her accepted February 13, 2014 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 15, 2014 appellant, then a 40-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that she sustained head, neck, back, left hip, and right knee injuries when she was involved in a motor vehicle accident while delivering mail on February 13, 2014 in the performance of duty. She stopped work on the date of injury. OWCP initially accepted the claim for a head contusion. By decisions dated July 29 and August 7, 2015, it expanded the acceptance of the claim to include contusions of the face, scalp, and neck, as well as right lateral collateral knee ligament sprain, hip and thigh sprain, and lumbar sprain. The record reflects that OWCP paid appellant wage-loss compensation on the supplemental rolls for the period February 14 to May 16, 2014.

On June 22, 2016 appellant filed a claim for compensation (Form CA-7) for leave without pay during the period May 31 to June 22, 2016.

In a development letter dated June 27, 2016, OWCP advised appellant that additional medical evidence was necessary to establish disability during the period claimed. It afforded appellant 30 days to submit the necessary evidence. No response was received.

By decision dated August 26, 2016, OWCP denied appellant's wage-loss compensation claim for disability for the period May 31 to June 22, 2016. It found that the evidence of record was insufficient to establish that she was totally disabled from work during the claimed period due to her accepted February 13, 2014 employment injury.

Following the August 26, 2016 decision, OWCP received requests for authorization for physical therapy dated March 10, April 9, June 8, and August 17, 2016, and physical therapy reports covering the period February 11 through October 4, 2016.

In an August 17, 2016 report, Dr. Michael Winkleman, a Board-certified physiatrist, related that appellant was seen for a refill of her prescriptions and reported that she was doing fair without any significant new problems. Appellant reported a recurrence of left-sided greater tender bursitis.

⁴ *Order Remanding Case*, Docket No. 18-1742 (issued August 15, 2019); Docket No. 17-1497 (issued March 19, 2019); Docket No. 17-1160 (issued December 19, 2018); Docket No. 17-0875 (issued December 13, 2018); Docket No. 16-1838 (issued October 17, 2017), *petition for recon. denied*, Docket No. 16-1838 (issued April 9, 2018).

In a report and office notes dated October 13, 2016, Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, detailed appellant's February 13, 2014 employment injury and medical histories. He provided physical examination findings. Dr. Chmell diagnosed L4-5 and L5-S1 disc protrusions with facet arthropathy and radiculopathy, right torn posterior medial horn meniscus with coccydynia and chondromalacia, and left hip greater trochanteric bursitis with sprain and aggravated osteoarthritis, which he attributed to the accepted February 13, 2014 employment injury. In the October 13, 2016 narrative report, he also related that appellant was "presently fully incapacitated for duty and disabled for any type of work."

In a December 8, 2016 report, Dr. Chmell noted that appellant was evaluated on October 13, 2016 for multiple injuries sustained as the result of a February 13, 2014 employment-related motor vehicle accident. He concluded that, as a result of the employment injury, appellant sustained a lumbar sprain, right torn medial meniscus, left traumatic arthritis, L4-5 and L5-S1 disc herniations with radiculopathy and coccydynia. Dr. Chmell opined that appellant was currently totally disabled from work due to her employment injuries and required further medical treatment for her work injuries.

A March 22, 2017 report from Dr. Winkleman noted examination findings, medication, and treatment provided.

OWCP received requests for authorization for physical therapy dated August 17, 2016, April 10 and 11, May 2 and 3, July 12, and August 30, 2017 and physical therapy notes covering the period February 11, 2016 through August 30, 2017.

In a July 3, 2017 attending physician's report (Form CA-20), Dr. Winkleman diagnosed lumbar spondylosis, which he attributed to the accepted February 13, 2014 employment injury. He left the sections blank, which related to the period of disability.

Appellant appealed to the Board on September 16, 2016. By decision dated October 17, 2017,⁵ the Board affirmed OWCP's August 26, 2016 decision. Following the Board's October 17, 2017 decision, OWCP received the following evidence.

A March 22, 2017 prescription for physical therapy, an April 2, 2018 request for authorization for physical therapy, and physical therapy reports covering the period June 13 to August 15, 2017.

In a letter dated October 18, 2017, appellant requested wage-loss compensation for the period May 17, 2014 through May 31, 2016 and reconsideration of the decisions denying her claims for wage-loss compensation.

Appellant, in an October 21, 2017 letter, requested a formal decision on why she was not placed on the daily, short-term or periodic rolls for her temporary disability as she had received benefits which exceeded 60 days.

⁵ Docket No. 16-1838 *id.*

In an October 25, 2017 letter, appellant requested a formal decision on why OWCP did not pay wage-loss compensation on and after May 16, 2014.

Appellant, in letters dated February 9, March 12, and July 24, 2018, requested reinstatement of her continuation of pay (COP) or a formal decision denying her entitlement to COP.

On April 17, 2018 appellant resubmitted her January 8, 2014 reconsideration request.

On July 23, 2018 appellant requested reconsideration of the August 26, 2016 decision denying her claim for wage-loss compensation for the period May 31 to June 22, 2016. She asserted that OWCP improperly shifted the burden of proof as it was OWCP's burden to prove she was no longer disabled due to her accepted February 13, 2014 employment injury.

In an August 17, 2018 letter, appellant asserted that it was OWCP's burden of proof to establish that she no longer had any disability due to her accepted employment injuries. As OWCP failed to meet its burden of proof, she asserted that she was entitled to wage-loss compensation for the period May 16, 2014 through August 26, 2016. Appellant requested a formal decision on her April 17, 2018 reconsideration request.

By decision dated August 29, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On September 2, 2018 appellant again wrote to OWCP and argued that she had established disability from May 16, 2014 through August 26, 2016 and that OWCP should not have stopped payment of wage-loss compensation. By letter dated September 9, 2018, she requested a decision regarding the termination of her compensation benefits and argued that OWCP had effectively reduced her entitlement to compensation to zero. OWCP received multiple letters from appellant dated September 10, 12, and 17, October 3 and 21, November 3 and December 7, 2018, January 28 and June 15, 2019 in which she continued to allege that OWCP had improperly denied her claim for wage-loss compensation.

On September 20, 2018 appellant filed an appeal with the Board. By order dated August 15, 2019,⁶ the Board set aside the August 29, 2018 OWCP decision, finding that appellant had filed a timely request for reconsideration. The Board remanded the case for application of the standard for reviewing timely requests for reconsideration.

By decision dated September 17, 2019, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁷ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which

⁶ *Supra* note 4.

⁷ *M.W.*, Docket No. 20-0881 (issued January 13 2021); *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

compensation is claimed is causally related to the employment injury.⁸ For each period of disability claimed, the employee has the burden of establishing that she was disabled for work as a result of the accepted employment injury.⁹ Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.¹⁰

Under FECA the term “disability” means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹¹ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹² When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.¹³

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish total disability for the period May 31 through June 22, 2016 causally related to her accepted February 13, 2014 employment injury.

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁴ It is therefore unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP’s August 26, 2016 decision because the Board considered that evidence in its October 17, 2017 decision.¹⁵

Following the August 26, 2016 OWCP decision, appellant submitted physical therapy reports covering the period February 11, 2016 to August 15, 2017. The Board notes that certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered “physician[s]” as defined under FECA. Consequently, their

⁸ See *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ See *C.E.*, Docket No. 19-1617 (issued June 3, 2020); see also *David H. Goss*, 32 ECAB 24 (1980).

¹⁰ 20 C.F.R. § 10.5(f); see *W.C.*, Docket No. 19-1740 (issued June 4, 2020); *Fereidoon Kharabi*, 52 ECAB 291 (2001); *Edward H. Horton*, 41 ECAB 301 (1989).

¹¹ 20 C.F.R. § 10.5(f); see *J.M.*, Docket No. 18-0763 (issued April 29, 2020); *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003).

¹² *D.S.*, *supra* note 8; *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹³ *D.S.*, *id.*; *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁴ *J.T.*, Docket No. 18-1757 (issued April 19, 2019); *S.S.*, Docket No. 17-1106 (issued June 5, 2018); *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

¹⁵ *Supra* note 5.

medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹⁶ Thus, this evidence is insufficient to support appellant's entitlement to wage-loss compensation for the period May 31 through June 22, 2016.

Dr. Winklemann, in reports dated August 16, 2016, and March 22 and July 3, 2017, provided examination findings, treatment provided, and diagnosed lumbar spondylosis, which he attributed to the accepted February 13, 2014 employment injury. However, he did not address the claimed disability. The Board has held that medical evidence that does not provide an opinion as to whether a period of disability is due to an accepted employment-related condition is insufficient to meet a claimant's burden of proof.¹⁷ Thus, the Board finds that Dr. Winklemann's reports are insufficient to establish appellant's claim for wage-loss compensation for the period May 31 through June 22, 2016.

Appellant also submitted reports dated October 13 and December 8, 2016 from Dr. Chmell, who Dr. Chmell diagnosed lumbar sprain, right torn medial meniscus, left traumatic arthritis, L4-5 and L5-S1 disc herniations with radiculopathy and coccydynia, which he attributed to the accepted February 13, 2014 employment injury. He did not discuss any period of disability in his October 13, 2016 office notes. In his October 13, 2016 narrative report, he related that appellant was "presently" totally disabled from work. Dr. Chmell did not address the relevant time period of May 31 through June 22, 2016. The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.¹⁸ To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.¹⁹ Dr. Chmell's December 8, 2016 report is also insufficient to establish appellant's claim for disability during the period in question. While, he indicated that appellant was totally disabled from work, he did not address the specific period of disability claimed.²⁰ Therefore, this report does not establish disability for work during the claimed period. Appellant has not submitted rationalized medical opinion evidence establishing that she was disabled from work for the period May 31 through June 22, 2016 causally related to her accepted February 13, 2014 employment injury. Thus, she has not met her burden of proof.

¹⁶ Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(a)(1) (January 2013). See *F.H.*, supra note 8; *J.L.*, Docket No. 17-1207 (issued December 8, 2017) (a physical therapist is not considered a physician under FECA); see also *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

¹⁷ *R.J.*, Docket No. 19-0179 (issued May 26, 2020); *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁸ *Supra* note 10.

¹⁹ *Id.*

²⁰ *L.F.*, Docket No. 19-0024 (issued January 2, 2020); *T.L.*, Docket No. 18-0934 (issued May 8, 2019); see also *Jaja K. Asaramo*, 55 ECAB 200 (2004).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability for the period May 31 through June 22, 2016 causally related to her accepted February 13, 2014 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board